MOTION FILED
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No. 81-2159

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BILL M. SILKWOOD, Administrator of the
Estate of KAREN G. SILKWOOD, Deceased
Appellant,

v.

THE KERR-McGEE CORPORATION, A Delaware Corporation, and
THE KERR-McGEE NUCLEAR CORPORATION,
A Delaware Corporation
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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IN THE

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BILL M. SILKWOOD, Administrator of the Estate of KAREN G. SILKWOOD, Deceased

Appellant,

-v-

THE KERR-McGEE CORPORATION, A Delaware Corporation, and THE KERR-McGEE NUCLEAR CORPORATION,

A Delaware Corporation

Appellees,

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The New Jersey Department of the Public Advocate[1] (Department) respectfully moves this Court for leave to file the attached brief amicus

[1] The Department, an independent executive agency of New Jersey state government, N.J.S.A. 52:27E-2, is specifically empowered to "represent the public interest in such administrative and (Footnote continued on next page)

curiae in this case. The consent of the attorney for the appellant has been obtained. The consent of the attorney for the appellees was requested but refused.

The Department provides legal representation in a wide range of "public interest" cases through its Division of Public Interest Advocacy, N.J.S.A. 52:27E-28 to 32, involving housing, health, the environment, and social welfare benefits.[2] Additionally, through a Division of Rate Counsel, the Department represents the public interest in proceedings before any State department or agency "charged with the regulation or control of any utility regarding...the

(Footnote 1 continued)
court proceedings...as the Public Advocate deems shall best serve the public interest," N.J.S.A. 52:27E-29.

2 See, e.g., So. Burlington County N.A.A.C.P. v. Tp. of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975), (Mt. Laurel I), cert. den. 423 U.S. 808 (1975), suppl. 92 N.J. 158, 456 A.2d 390 (1983) (Mt. Laurel II) (fair share housing).

the fixing of a rate." N.J.S.A. 52:27E-18.[3]

The interest of the Department in this case arises from its frequent experiences with nuclear related issues affecting citizens of New Jersey[4] and its general statutory mandate to represent the "public interest."[5] New Jersey has several nuclear power plants, and its citizens will be

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3 The Division of Rate Counsel has litigated extensively in matters involving nuclear power, electric utility rates, and similar energy-related areas. See, e.g., Matter of Redi-Flo Corp., 76 N.J. 21, 384 A.2d 1086 (1978). In re Petition of Jersey Central Power & Light Co., 85 N.J. 520, 428 A.2d 498 (1981). See also, In re Pennsylvania Power and Light Co., Federal Energy Regulatory Comm., Docket No. ER-81-400-000.

4 The Public Advocate has frequently appeared before the Nuclear Regulatory Commission to represent the interests of New Jersey citizens. See, e.g., In The Matter of Offshore Power Systems (Floating Nuclear Plants), STN 50-437; Atlantic Generating Station, 2 NRC 702 (1975); Public Service Electric and Gas Co. (Hope Creek 1 and 2), 5 NRC 769 (1977).

5 See Mt. Laurel Twp. v. Dept. of Public Advocate, 83 N.J. 522, 535, 416 A.2d 886, 893 (1980) (Department characterized as "a shining example of [the state government's] commitment [to the public interest]").

directly affected by the Court's decision on the nature and scope of relief available for tortious injuries from nuclear facilities.[6]

The Department seeks leave to present its views on two issues that have not yet been addressed by the parties or any court: (1) the role of punitive damages as an integral part of the legal tradition of virtually every legal system; and (2) the manner in which punitive damages fit into an integrated framework of federal-state regulation of nuclear licensees. Its brief traces the historical development of punitive damages and explains

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[6] Additionally, a petition for writ of certiorari from a decision of the state courts of New Jersey, raising a related issue is pending before the Court. Van Dissel v. Jersey Central Power and Light Co., 181 N.J.Super. 516, 438 A.2d 563 (App. Div. 1981), certif. den., 89 N.J. 409, 446 A.2d 142 (1983), cert. petit. filed, No. 81-2065, 50 U.S.L.W. 3918 (1982). Van Dissell presents the question of whether the Atomic Energy Act preempts a state common law tort claim by property owners for environmental damage to their property by a nuclear power plant. The resolution of this case will undoubtedly affect the disposition of Van Dissel.

why this remedy promotes traditional and vitally important attributes of a State's police power. Consideration of this history is essential for a proper resolution of the issues here. To our knowledge, no party or other amicus in this case will similarly develop the historical research or the other matters addressed.

For the above reasons,[7] the Department respectfully requests leave to file the attached brief amicus curiae in this case.

Respectfully submitted,

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[7] The Department has previously submitted, amicus briefs in other cases before this Court involving mental health issues. See, e.g., Kremens v. Bartley, 431 U.S. 119 (1977); Parham v. J.R., 442 U.S. 584 (1974).

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A Delaware Corporation

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF AMICUS CURIAE OF THE STATE OF NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE

STATEMENT OF INTEREST OF AMICUS CURIAE

The New Jersey Department of the Public Advocate (Department), an independent and unique executive agency of New Jersey state government, N.J.S.A. 52:27E-2,[1] has, for almost nine years, litigated extensively in major areas affecting "the public interest." During this period, the Department has participated in a wide variety of proceedings involving issues relating to housing, employment, the environment, rights of the mentally handicapped,

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[1] The Department is specifically empowered to "represent the public interest in such administrative and court proceedings....as the Public Advocate deems shall best serve the public interest." N.J.S.A. 52:27E-29. "Public interest" is defined as "an interest arising from the Constitution, decisions of the court, common laws or other laws of the United States or of this state inhering in the citizens of this State or in a broad class of such citizens." N.J.S.A. 52:37E-30. See, also N.J.S.A. 52-27E-31 (factors to be considered in deciding whether to represent a particular public interest).

utility regulation and nuclear power. [2] In these

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[2] The Department provides legal representation in a wide range of "public interest" cases through its Division of Public Interest Advocacy, N.J.S.A. 52:27E-28 to 32. See, e.g., So. Burlington Cty. NAACP v. Tp. of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975), cert. den. 423 U.S. 808 (1975), suppl. 92 N.J. 158, 456 A. 2d 390 (1983) (fair share housing); Klein v. Califano, 586 F.2d 250 (3 Cir. 1977) (nursing home funding); Overlook Terrace Management Corp. v. Rent Control Bd., 71 N.J. 451, 366 A.2d 321 (1976) rent control); Van Ness v. Borough of Deal, 78 N.J. 174, 393 A.2d 571 (1978) (applicability of public trust doctrine to beach access). Through a separate Division of Rate Counsel, the Department also represents the public interest in proceedings before any State department or agency "charged with the regulation or control of any business, industry or utility regarding...the fixing of a rate...for a product or service." N.J.S.A. 52:27E-18. That Division has litigated extensively in matters involving nuclear power and electric utilities regulation. See, e.g., Matter of Redi-Flo Corp., 76 N.J. 21, 384 A.2d 1086 (1978); In re Petition of Jersey Central Power & Light Co., 85 N.J. 520, 428 A. 2d 498 (1981); and In The Matter of Public Service Electric & Gas Co., (Hope Creek 1 and 2), 5 NRC 769 (1977). See also, In re Pennsylvania Power & Light Co., Federal Energy Regulatory Com., Docket No. ER 81-400-000 (Decision and Order of April 1, 1983, finding that "participation by the [Public] Advocate may be in the public interest...[p]articularly in view of [the] Advocate's capacity as a representative under State law of New Jersey [electric utility] customers." Id., at 5)

(footnote continued on next page)

proceedings, the important role of the Department as a representative of the public interest has been frequently acknowledged. [3]

(Footnote 2 continued)

The Division of Mental Health Advocacy, which represents "indigent mental hospital admittees" in individual matters involving their "admission to, retention in, or release from" mental hospitals, N.J.S.A. 52:27E-24, and in class actions on "an issue of general application to them, "N.J.S.A. 52:27E-25, has submitted, or moved for leave to file, amicus briefs in four other cases before this court involving mental health issues within its relevant experience and expertise. Kremens v. Bartley, 431 U.S. 119 (1977); Parham v. J.R., 442 U.S. 584 (1974); Mills v. Rogers, ___ U.S. ___, 102 S.Ct. 2442 (1982) (motion to file amicus brief out of time den. U.S. ___, 102 S.Ct. 990 (1982)); Jones v. United States, cert. granted ___ U.S. ___, 102 S.Ct. 999 (1983). See also, Pennhurst State School v. Halderman, 451 U.S. 1 (1981) (amicus brief filed by Division of Advocacy for the Developmentally Disabled of the Department of the Public Advocate, see N.J.S.A. 52:27E-41.1 to 41.5, along with "protection and advocacy systems," see 42 U.S.C. §6012, of forty-four individual states and territories).

[3] Recently, for example, the New Jersey Supreme Court characterized the Department as "a shining example of that commitment [by the government to the public interest,]" Mt. Laurel Twp. v. Dept. of the Public Advocate, 83 N.J. 522, 535, 416 A.2d 886, 893 (1980), and of "admirably further[ing] the principles embodied in our Constitution," id. at 536, 416 A.2d at 893, as it fulfills the role of "nourishing and revitalizing our political system," id.

This case presents the question of whether the traditional common law remedial authority of a State to award punitive damages for injuries caused by tortious conduct resulting in nuclear contamination within its borders is preempted by the federal Atomic Energy Act. The interest of the Department in this question arises from its frequent experience with nuclear related and other energy issues affecting citizens of New Jersey (note 1, supra) and its general statutory mandate to represent the "public interest." New Jersey has several nuclear power plants, and the public interest of large numbers of people in this State will be directly affected by the decision of this Court on the nature and scope of relief available for tortious injuries to persons or property resulting from the operation of these plants.

The Department appears as amicus curiae to address several fundamental aspects of preemption analysis that have not heretofore been

discussed by any court: (1) the historic role of punitive damages as an integral part of the legal tradition of virtually every legal system, including the Anglo-American common law system, in cases involving the public interest or violations of the public trust, and (2) the manner in which punitive damages, rather than conflicting with the federal regulatory scheme, actually fit into an integrated framework of federal-state regulation of nuclear licensees. An examination of both of these factors provides compelling support for the conclusion that the award of punitive damages under Oklahoma law in the present case is not preempted by the Atomic Energy Act.

STATEMENT OF THE CASE

Appellant Bill M. Silkwood, administrator of the the estate of his daughter, the late Karen G. Silkwood, filed a diversity suit against appellees Kerr-McGee Corporation and Kerr-McGee Nuclear Corporation in the United States District Court

for the Western District of Oklahoma, seeking compensatory and punitive damages (based on common law tort principles) for injuries suffered by his daughter during a nine-day period when she was exposed to and contaminated by plutonium. Silkwood v. Kerr-McGee, 667 F.2d 908, 912 (10 Cir. 1981). The jury was carefully instructed on the elements of exemplary or punitive damages under Oklahoma Law, Silkwood v Kerr-McGee Corp., 485 F.Supp. 566, 603 (W.D. Okl. 1979) (Jury Instruction No. 19), and its verdict included an award of $10 million in punitive damages.

On appeal, the United States Court of Appeals for the Tenth Circuit (Tenth Circuit), in a 2-1 decision, reversed in part the judgment of the district court on the ground that the Atomic Energy Act, 42 U.S.C. §§2011 et seq., preempted the State from awarding punitive damages for injuries relating to the operation of a nuclear power plant. Silkwood v. Kerr-

McGee, 667 F.2d, supra, at 921-23. Over the sharp dissent of Judge Doyle, the majority relied substantially on Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8 Cir. 1971), aff'd mem. 405 U.S. 1035 (1972), as its authority for the proposition that "any state action that competes substantially with the AEC (NRC) in its regulation of radiation hazards associated with plants handling nuclear material" would be preempted, 667 F.2d at 923 (emphasis added), whether it be by "judicial award" or "direct legislative acts," id.

Judge Doyle rejected the majority's analysis, characterizing a tort action as "a far cry from a regulatory system." Id. at 929. He emphasized:

> No collision exists nor is one possible between the simple state law inspired tort action and the federal government. To say that preemption prevents the imposition of exemplary damages in connection with a civil judgment carries the preemption concept far beyond anything that could

> have been intended or could ever be implied.

Id.

This Court granted review to resolve the important question of whether a state punitive damages award is preempted by the federal Atomic Energy Act. ___ U.S. ___, 51 U.S.L.W. 3508 (1983).

SUMMARY OF ARGUMENT

Punitive damages have been an integral part of the fabric of virtually every legal system--both common law and pre-common law--known to recorded history. In the federal system, the development of tort law has traditionally been left to the States, and punitive damages have played an important role in promoting the essential values that are central to the state's historic police power. By affording a private remedy for reprehensible or reckless conduct that causes damage to person or property, punitive damages protect those significant individual

and societal interests that have always been the primary responsibility of the States throughout the history of this country.

The Atomic Energy Act of 1954 (Act) must be read against this historical background. Congress was not legislating in a vacuum, but instead against the backdrop of a venerable remedy traditionally available in state courts to deter or punish reckless actions jeopardizing the health, welfare and well-being of its citizens. Therefore, "Congress legislated here in a field which the States have traditionally occupied . . . so we start with the assumption that the historic police powers of the State were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Pacific Gas and Electric Co. v. Energy Res. Comm'n, ___ U.S. ___ (1983), slip op. at 13, quoting from Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 230 (1947). Yet,

neither in the Act nor its legislative history is there any indication that punitive damages, which affect "interests . . . deeply rooted in local feeling and responsibility," San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244 (1959), are unavailable to a person contaminated by radiation as a result of the reckless or grossly negligent conduct of the operator of a nuclear power plant. In light of this legislative record, the Tenth Circuit fundamentally erred in its conclusion that punitive damages--historically within the police power of the State--could be preempted by speculative inferences from Congressional silence.

In stark contrast to the Tenth Circuit's view, punitive damages facilitate, rather than impair, compliance with the dictates of the Act. The nuclear industry is largely self-regulated. Punitive damages, as well as other traditional state tort remedies, provide an essential means

for ensuring careful adherence by regulated facilities to the unique responsibilities associated with the development of nuclear power. Therefore, the Court of Appeals' notion that an award of punitive damages "competes substantially with the AEC (NRC) in its regulation of radiation hazards associated with plants handling nuclear material," Silkwood v. Kerr-McGee, 667 F.2d, supra, at 908, simply cannot be squared with the realities of the complementary role of states in affording its citizens traditional tort relief and the remedy of punitive damages.

ARGUMENT

I.

PUNITIVE DAMAGES HAVE BEEN OF CRITICAL IMPORTANCE TO VIRTUALLY EVERY RECORDED LEGAL SYSTEM; IN THIS COUNTRY, THEY TRADITIONALLY HAVE BEEN AN INTEGRAL PART OF THE STATES' HISTORIC POLICE POWERS

The remedy of punitive damages is an ancient one, traditionally available as a judicial response to a tort of outrage. It precedes the common law by hundreds of years and is entrenched in the fabric of the law of all but a handful of states. As will be explained below, in this country, punitive damages have assumed considerable importance in preserving the states' historic ability to protect the health and well-being of its citizens--a critical aspect of the historic police powers of the states. Consideration of this long and venerable tradition of punitive damages in both common law and pre-common law societies provides an essential backdrop for the proper resolution of the

preemption issues before the Court.

This case reflects precisely the type of "reprehensible conduct" in need of prospective deterrence, see Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974); IBEW v. Foust, 442 U.S. 42, 48 (1979), to which punitive damages are appropriately applied. An examination of the remedy's historical roots reveals no less.

A. Punitive Damages In Pre-Common Law Societies

It has been frequently stated that the right to punitive damages "is as old as the right to trial by jury," Toole v. Richardson-Merrell Inc., 251 Cal. App. 2d 689, 60 Cal. Rptr. 398, 419 (Ct. App. 1967), or that such damages "have always been recoverable at common law," Aladdin Mfg. Co. v. Mantle Lamp Co. of America, 116 F.2d 708, 716 (7 Cir. 1941). Both dicta understate the case: the concept of punitive damages dates back to at least 2000 B.C., some 3200

years prior to the first trial by jury,[4] and about the same amount of time prior to the reign of Edward I (when the phrase "common law" first came into use). See e.g., Maitland, The Constitutional History of England 22 (1931 ed.).

The roots of punitive damages are in the Code of Hammurabi: if a person were to steal an "ox or a sheep or an ass or swine or a boat" [sic, most likely should be "goat"] from a temple or palace, "he shall pay 30-fold"; if the owner is a "villein" (freeman), "he shall replace [its value] 10-fold." Laws of Hammurabi §68, reprinted in 2 Driver and Miles, eds., The Babylonian Laws 17 (1955).[5] Other portions of

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[4] See 1 Baildon, Select Civil Pleas, A.D. 1200-1203 49 (Selden Society ed. 1890), excerpted in Smith, Cases and Materials on the Development of Legal Institutions 218-219 (1965).

[5] This section probably dates back to even earlier Babylonian law. The thirty-fold restitution penalty was apparently adapted from a Sumerian law (several hundred years prior to Hammurabi's reign, see 1 Driver and Miles, (Footnote continued on next page)

the code reveal other similar punishments: a

(Footnote 5 continued)
supra, at 5) penalizing one in this manner for stealing cattle from the goddess Belît of Uruk. Id. at 82, n. 2. Other pre-Hammurabi texts reveal similar motifs. The code of Lipit-Ishtar -- which antedates Hammurabi by over 150 years, see Pritchard ed., Ancient Near Eastern Texts Relating to the Old Testament 159 (1950) (hereinafter "Pritchard I") -- mandates a penalty of one fourth the value of an ox to be paid by one who has rented it and damaged its tail. Lipit-Ishtar Lawcode, Sec. 37, reprinted in id. at 161. Similarly, the laws of Eshnunna -- a kingdom which flourished just before the beginning of the Hammurabi period, id. -- provided for punitive damages (10 shekels of silver) in the case of a farm worker who fails to complete harvest work, Laws of Eshnunna, sec. 9, reprinted in id. at 162, and, even more significantly, adopts a dual set of penalties to deal with cases where one assaults another volitionally and where the blow is done accidentally, id., secs. 46-47, reprinted in id. at 163.

In the Ur dynasty, punitive damages were assessed for malicious prosecution: if a man falsely accused another's wife of fornication and she was proved innocent, the accuser had to pay one-third of a mina of silver. The Laws of Ur-Nammu, §11, reprinted in Pritchard, ed., The Ancient Near East: Supplementary Texts and Pictures Relating to the Old Testament 88 (1969). Finally, under Sumerian law, another dual set of penalties is created: if a man accidentally hits a woman causing her to miscarry, the penalty is 10 shekels of silver; if he hits her deliberately, the penalty is 20 shekels. Sumerian Laws, rev. col. iv. §1, reprinted in id. at 89.

merchant who denies the receipt of money from his agent must pay sixfold, Laws of Hammurabi §107, reprinted in 2 Driver and Miles, supra, at 45; the agent who misappropriates that which belongs to his master must pay treble damages, Laws of Hammurabi §106, reprinted in id.[6] Although these penalties were fixed by law, "they may be regarded as resembling the 'vindicative or exemplary damages' of modern English law." 1 Driver and Miles, supra, at 500.[7]

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[6] See also, id. §12, reprinted in 2 Driver and Miles, supra, at 19 (five-fold damages in certain stolen property cases); id. §43, reprinted in id. at 27 (failure to cultivate rental land makes farmer liable to do additional ploughing beyond the terms of his agreement with the owner). These admittedly-difficult and obscure provisions are discussed in 1 Driver and Miles, supra, at 97-101, 136-138.

[7] Post-Hammurabi Assyrian laws perpetuate these concepts. The laws of Middle Assyria -- dating from the 15th to 12th centuries B.C., Pritchard I, supra, at 180 -- set up a dual set of penalties in bailment situations: if a clothier shall lose one's clothing, he must make simple

(Footnote continued on next page)

This recordation is not idiosyncratic.[8] Similar provisions are found in Mosaic and

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(Footnote 7 continued)

restitution; if, however, the clothier sells the goods (and is subsequently criminally prosecuted), he must make several-fold restitution as well. The Middle Assyrian Laws, Tablet M. ¶ 3, reprinted in id. at 188.

Also, the Hittite laws remarkably appear to establish a three-tier system for imposing civil punishment in certain death cases: the equivalent of first degree murder ("If anyone kills a Hittite merchant for (his) goods, he shall give [x minas of silver] and shall make three-fold compensation for (his) goods"), second degree ("[If] he had no goods with him, and anyone kills him in a quarrel, he shall give six minas of silver"), and manslaughter ("But if (only) the hand is doing wrong, he shall give 2 minas of silver"). The Hittite Laws, Tablet I, ¶ 5 (later version), reprinted in id. at 189.

[8] For recent overviews, see Belli, "Punitive Damages: Their History, Their Use and Their Worth in Present Day Society," 49 U.M.K.C.L. Rev. 1 (1980), and Riley, "Punitive Damages: The Doctrine of Just Enrichment," 27 Drake L. Rev. 195 (1977-1978).

Talmudic law,[9] in Roman law,[10] Athenian law[11]

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9 The Old Testament penalty for slaughter of stolen cattle was the restoration of five oxen for an ox, and four sheep for a sheep; if the cattle were not slaughtered, the restoration penalty was two-fold. Exodus 22:1,3,21,37. Multiple and punitive damages were also enacted in certain bailment misappropriation cases, see e.g., Horowitz, The Spirit of Jewish Law §282, at 525-526 (1953), for physical indignity, id. §315 at 597, 598, and in cases involving informers (one of the most grievous wrongs in Jewish law), id., §330 at 621-623.

10 Although Sedgwick suggests that exemplary damages were "unknown" in Roman law, 1 Sedgwick, Measure of Damages §355, at 701 (9th ed. 1912), a misassumption subsequently repeated by others, see, e.g., Brandwen, "Punitive-Exemplary Damages in Labor Relations Litigation," 29 U.Chi. L.Rev. 460, 462 (1962), multiple damages were in fact awarded in cases involving acts "involving physical injury perpetrated with an element of wanton wilfulness or conscious deliberation." Redden, Punitive Damages §22, at 25 (1980). See also, Nicholas, An Introduction to Roman Law, 217-225 (1977) (e.g., four-fold damages recoverable if a person was induced -- through metus, or duress -- to act to his own detriment); Lawson, Negligence in the Civil Law 7 (1950) (in Lex Aquilia, civil damage penalty doubled when defendant denied liability); Sanders, The Institutes of Justinian 412-413 (8th ed. 1888).

11 "If anyone wrongly causes damages to anyone else intentionally, let him pay double the amount of it; if unintentionally, the simple amount." MacDowell, The Law In Classical

(Footnote continued on next page)

Hindu law,[12] Germanic law,[13] early Anglo-Saxon law,[14] and Welsh law.[15]

(Footnote 11 continued)
Athens 153 (1978). Aristotle's words on the subject are still applicable:

> The generality of men are naturally apt to be swayed by fear rather than by reverence, and to refrain from evil rather because of the punishment that it brings than because of its own foulness.

Aristotle, Nichomachean Ethics, bk X, ch.9, at 1.

12 The Laws of Manu -- dating to about 200 B.C. -- provides for punitive damages in the cases of denial of debts, id. §51, reprinted in Kocourek and Wigmore, eds., Sources of Ancient and Primitive Law 469, 473 (1915); false swearing, id., §98, reprinted in id., at 477; and crop damages, id., §241, reprinted in id., at 488.

13 Defaulting on a debt resulted in a penalty of 15 shillings "above the debt which [the defendants] had promised." Lex Salica, Title L, reprinted in id., at 500, 508. This code -- from 400 A.D. -- is probably "the oldest written Germanic code which survives." Id., at 500, n.1.

14 Multiple and punitive damages are reflected in almost every aspect of King Aethelbirht's Dooms, the laws of a sixth century Kentish King. See id. at 512-518. The commentators note that, at early Anglo-Saxon law, a sum of damages was assessed "on every wound that could be inflicted on [a freeman's] person, for nearly every injury that could be done to his civil rights, honour, or peace; the sum being aggravated according to

(Footnotes 14 and 15 continued on next page)

B. Punitive Damages In The English Common Law

From the very beginnings of the English common law,[16] the concept of punitive damages has been an integral part of the legal system. Indeed, punitive damages have been an essential aspect of the modern common law tradition for over 200 years, arising first in two leading British cases during the reign of King George III.

(Footnotes 14 and 15 continued)
adventitious circumstances." Maine, Ancient Law 380 (1907), quoting 1 Kemble, Anglo-Saxon Laws and Institutions 177 (1841).

15 A tenth century Welsh text establishes an elaborate civil damage scale for physical assaults, with penalties increasing commensurately with the viciousness of the attack. See Laws of Howell Dda, ch. xxiii, reprinted in 1 Kocourek and Wigmore, supra, at 519, 548.

16 More than 700 years ago, a statute of Gloucester (6 Edw. I, c. 5 [1278]) awarded treble damages for waste. See Note, "Exemplary Damages in the Law of Torts," 70 Harv.L.Rev. 517, 518 (1957) (hereinafter "Exemplary Damages"). Subsequently, in a 1346 detinue case, damages would be doubled if the plaintiff could prove the writing in question had been "burnt or eloigned." Fifoot, History and Sources of the Common Law: Tort and Contract 29 (1953), quoting Y.B., 20 Ed. III (R.S.), p. 74.

In the first, following the publication by John Wilkes of an allegedly libelous pamphlet, the King sent his messengers and a constable to Wilkes' house, where they broke in and seized his papers on a general warrant; Wilkes sued, and asked for £5000, Wilkes v. Wood, Lofft 1, 98 Eng. Rep. 489 (C.P. 1763). In his charge to the jury, Lord Chief Justice Pratt stated:

> [A] jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.

Id., Lofft at 18-19, 98 Eng. Rep. at 498-499 (emphasis added). The jury returned a verdict of £1000 for the plaintiff, which was upheld by the court, id., Lofft at 19, 98 Eng. Rep. at 499, the first modern punitive damages award, Redden, supra, §22 (A)(2), at 26.

In the second case, Huckle v. Money, 2

Wils.K.B. 205, 95 Eng. Rep. 768 (C.P. 1763), the printer of the pamphlet in question was detained for six hours (but not otherwise physically damaged).[17] In the court's opinion refusing to set aside a £300 damage award (notwithstanding the plaintiff's admission that his actual damages could not have amounted to more than £20), the actual phrase "exemplary damages" first appears:

> The small injury done to the plaintiff, or the inconsiderableness of his station and rank in life did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject appeared to them in the trial; they saw a magistrate over all the King's subjects, exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant before them; they heard the King's Counsel, and saw the solocitor of the Treasury endeavoring to support and

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17 The court noted he was kept "very civilly by [being treated] with beefsteaks and beer." Id.

> maintain the legality of the warrant in a tyrannical and severe manner. These are the ideas which struck the jury on the trial; and I think they have done right in giving exemplary damages. To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject...

Id., 2 Wils K.B. at 206-207, 95 Eng. Rep. at 769 (emphasis added).

C. Punitive Damages In The Federal System

The English cases described above represented "the jury's indignation at an especially outrageous attack on the plaintiff's security, or at wanton misconduct on the defendant's part," Lewis, Winfield on Tort §35, at 182-183 (6th ed. 1954), and set the stage for early American cases, see, e.g., Coryell v. Colbaugh, 1 N.J.L. 90, 91 (Sup. Ct. 1791) (injury in breach of promise to marry suit was "of the most atro-

cious and dishonorable nature," calling for exemplary damages); Tillotson v. Cheetham, 3 Johns. 56, 65, 66 (N.Y. Sup. Ct. 1808) (Spenser, J., concurring) (in "vindictive actions," jury should always be told "to inflict damages for example's sake, and by way of punishing the defendant"), see also, Sedgwick, supra, §§351-352, at 693-698.

This Court has, for over 130 years,[18] adhered to the view that "the question [of the propriety of the punitive damages doctrine] will not admit of argument," Day v. Woodworth, 13 How. 363, 371, 14 L.Ed. 181, 185 (1851), noting that

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18 The Court's tacit approval of the remedy actually dates to 1818, when, in a marine trespass admiralty case involving an illegal seizure on the high seas, it characterized the case as one of "gross and wanton outrage," which, if filed against the actual wrongdoers, would have been sounded in "the shape of exemplary damages, the proper punishment which belongs to such lawless misconduct." The Amiable Nancy, 3 Wheat. 546, 553, 4 L.Ed. 456, 459 (1818). For an analysis of the special problems endemic to such cases, see Note, "Punitive Damages in the Admiralty," 5 Maritime L. 223 (1980).

"men are often punished for aggravated misconduct or lawless acts...[where] the wrong done...is incapable of being measured by a money standard; and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of defendant's conduct," id. (emphasis added).[19]

The fundamental role of punitive damages as a means of "providing security for individual

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19 This doctrine was subsequently expanded beyond the "[mere] doing of an unlawful or injurious act" to encompass acts "conceived in the spirit of mischief, or of criminal indifference to civil obligation," Phila., Wilmington and Balt. R.R. Co. v. Quigley, 21 How. 202, 213, 62 U.S. 73, 77 (1858). For a compendium of early cases, see Lake Shore & M.S Ry. Co. v. Prentice, 147 U.S. 101, 107-109 (1893).

This Court has repeatedly reaffirmed these policies during its several recent terms. See, e.g., IBEW v. Foust, supra; City of Newport v. Fact Concerts, Inc., 453 U.S. 247,266-267 (1981); Smith v.Wade, ___ U.S. ___ (April 20, 1983), slip. op. at 5 ("in the latter part of the last century, the doctrine [of punitive damages] was accepted as settled law by nearly all state and federal courts, including this Court"), and cases cited at nn. 3, 8, 12 and 13.

interests," Note, "In Defense of Punitive Damages," 55 N.Y.U.L.Rev. 303, 337 (1980) (hereinafter "Defense Note"), or "as a reminder of the duty of care society imposes on each of its members for the safety of all others," id. at 323, "according to defendant's accountability for the injury," id. at 315, in all cultures is clear.

Therefore, there are multiple rationales for punitive damages:[20] (1) punishment and deterrence, City of Newport v. Fact Concerts, Inc., supra; Smith v. Wade, supra, slip op. at 19-20, 25; Thiry v. Armstrong World Industries, -- P.2d --, 51 U.S.L.W. 2617 (Okla. Sup Ct., March 22, 1983); "Exemplary Damages," supra, at 522; Prosser, supra, at 9; Coryell v.

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[20] See generally, "Exemplary Damages," supra, partially reprinted in Oleck, Damages to Person and Property §275A, at 560.1 (1960); McCormick, "Some Phases of the Doctrine of Exemplary Damages," 8 No.Car. L.Rev. 133 (1929); (hereinafter McCormick); McCormick, Damages §§77-79, at 275-282 (1935); Prosser, Torts §2, at 9-14 (4th ed. 1971).

Colbaugh, supra; Tillotson v. Cheetham, supra; (2) revenge,[21] "Exemplary Damages," supra; Riley, 27 Drake L.Rev., supra; Wilkes v.Wood, supra; (3) fulfillment of public justice, Belli, 49 U.M.K.C.L.Rev., supra, at 5-6; Oleck, supra, §269 at 541;[22] (4) to eliminate self-help,[23] Grey v. Grant, 2 Wils. K.B. 252, 95 Eng. Rep. 794 (C.P 1764); Merest v. Harvey, 5 Taunt. 422, 128 Eng. Rep. 761

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21 As Oliver Wendell Holmes had noted:

> If people would gratify the passion of revenge outside of the law, if the law did not help them, the law has no choice but to satisfy the craving itself and thus avoid the greater evil of private retribution.

The Common Law 4 (1881).

22 See also, e.g., Herman v. Hess Oil Virgin Islands Corp., 527 F.2d 767, 772 (3 Cir. 1975) (assess punitive damages "as an example to the community").

23 In early decisions, "one purpose of large awards was to prevent dueling." "Exemplary Damages," supra, at 522.

(C.P. 1814); (5) to vindicate constitutional rights, Scott v. Donald, 165 U.S. 58, 75-86 (1897); Huckle v. Money, supra; 1 Sedgwick, supra, §381 at 743; see generally, Bivens v. Six Unknown Named Agents, 403 U.S. 388, 395-397 (1971); (6) as a supplement to criminal sanctions, McCormick, 8 No.Car.L.Rev., supra, at 130;[24] "Defense Note," 55 N.Y.U.L. Rev., supra at 328, n.125 (and cases cited therein); United Construction Workers v. Laburnum Const. Corp., 347 U.S. 656, 665 (1954);[25] (7) or to reward the plaintiff for his public service

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[24] Punitive damages "tend to bring to punishment a type of oppressive conduct...which is theoretically criminally punishable, but which in actual practice goes unnoticed by prosecutors occupied with more serious crimes." Id.

[25] United Construction Workers has been relied upon by at least one circuit for its ruling that federal labor law (29 U.S.C. §187) did not preempt a punitive damage award under state law in a secondary boycott case "involving violent or wilful tortious conduct." Gulf Coast Building & Const. Trades Council v. F.R. Hoar & Son, Inc., 370 F.2d 746, 748 (5 Cir. 1967).

in bringing the wrongdoer to account, Neal v. Newburger Co., 154 Miss. 691, 123 So. 861 (1929), cited in McCormick, supra, §77 at 278, n.12; see also, Royal Business Machines v. Lorraine Corp., 633 F.2d 34, 49 (7 Cir. 1980) (punitive damages proper where "the public interest [would] be served by the award"); Thiry, supra ("the penalty should increase as the magnitude of the hazard to the public increases").

As the cases make clear, the remedy is similarly tailored to deal with a host of tortious behaviors:[26] where the action is "aggravated by evil motive, actual malice, deliberate violence, or oppression," Scott v. David, 165 U.S., supra, at 86, or is "reprehensible," Gertz v. Robert Welch, Inc., supra, where it reflects "aggravated

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[26] See generally, Burdick, The Law of Torts, §196 et seq. at 240 (4th ed. 1926); McCormick, 8 No.Car.L.Rev., supra at 133-135; McCormick, supra, §79 at 280-282; 1 Sedgwick, supra, §§363-368 at 710-726.

misconduct or lawless acts," Day v. Woodworth, supra, "gross and wanton outrage," The Amiable Nancy, supra, or the "conscious disregard of the rights of others," McCormick, supra, §79, at 280 (and cases cited at id.; n.6), or of societal interests, Ryan v. Foster & Marshall, Inc., 556 F.2d 460, 465 (9 Cir. 1977); Lampert v. Reynolds Metals Co., 373 F.2d 245, 248 (9 Cir. 1967);[27] where it is done "with intent to injure, with malicious outrage, with insult, or in revenge, or out of ill-will or desire to injure," 1 Sedgwick, supra, §364 at 716 (and cases cited at id., nn.117-122); where it is "reckless," Dorsey v. Honda Motor Co. Ltd., 655 F.2d 650, 656 (5 Cir. 1981), cert.

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[27] For more recent formulations, see, e.g., Knippen v. Ford Motor Co., 546 F.2d 993, 1002 (D.C. Cir. 1979); Macon-Bibb County Water and Sewerage Auth. v. Tuttle/White Constructors, Inc., 530 F.Supp. 1048, 1058 (M.D. Ga. 1981).

den. ___ U.S.___, 103 S.Ct. 177 (1982),[28] or where it reflects "conduct marked by violence and imminent threats to the public order," San Diego Building Trade Council v. Garmon, 359 U.S. 236, 247 (1959).[29]

Put another way, "punitive damages are based upon the degree of the defendant's culpability," Massachusetts Bonding and Insurance Co. v. United States, 352 U.S. 128, 133 (1956)

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[28] On this point, the Fifth Circuit cited the trial court opinion in the case before the Court for the proposition that "compliance with federal standards does not prevent awarding punitive damages if the defendant's conduct is reckless." Id., citing Silkwood v. Kerr-McGee Corp., 485 F.Supp. 566, 583-586 (W.D. Okl. 1979).

[29] As the Court has just reiterated:

> ... [P]unitive damages in tort cases may be awarded not only for actual intent to injure or evil motive, but also for recklessness, serious indifference to or disregard for the rights of others, or even gross negligence.

Smith v. Wade, supra, slip op. at 17-18. See also, id. at 13, n.10.

or outrageousness, see Durant v. Surety Homes Corp., 582 F.2d 1081, 1088 (7 Cir. 1978), in cases involving "great barbarity," Woert v. Jenkins, 14 Johns 352 (N.Y. Sup. Ct. 1817), the abuse of power under the color of authority,[30] or what has been pithily characterized as an "I-don't-care-attitude," Carroll v.Getty Oil Co., 498 F.Supp. 409, 417 (D. Del. 1980), partially quoting McHugh v.Brown, 125 A.2d 583, 586 (Del. Sup. Ct. (1956).

Furthermore, the availability of such a damage remedy is squarely within the core of

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30 Sedgwick supplies a portion of the court's opinion in Huckle v. Money, supra, not reproduced in Eng. Rep.:

> Whenever an injury is done under the color of authority,...if a master of a ship abuse the power by law vested in him over the sailors under his command,...the jury in assessing damages are not confined to the damages which have been actually sustained, but ought to assess exemplary damages.

1 Sedgwick, supra, §350 at 690 (quoting from Sayer, Damages 220 (1792)).

the historic police powers of the state. Just as the police power "guard[s] and promote[s] the public interests," Chicago, Burlington & Quincy R. Co. v. Illinois ex rel Grimwood, 200 U.S. 561, 26 S.Ct. 341, 346 (1906), and springs "from the obligation of the state to protect its citizens and provide for the safety and good order of society," Panhandle Eastern P. Line Co. v. State Highway Commission, 294 U.S. 613, 622 (1934), so does the ability of the states to enforce the remedy of punitive damages similarly promote the general welfare or "public interest." These salutory goals are accomplished because punitive damages provide for the "safety and good order of society," e.g., "Exemplary Damages," supra, at 521-522, punish and deter "socially disapproved conduct," Riley, 27 Drake L.Rev., supra, at 199, and enforce a "legitimate public purpose [by]...remedying a broad and general social...problem." Cf. Energy Reserves Group, Inc. v. Kansas Power and Light Co.,

___ U.S. ___, 74 L.Ed. 2d 569, 581 (1983). See also, Pacific Gas & Electric v. Energy Research Commission, ___ U.S. ___ (April 20, 1983), slip. opin. at 12-13. Therefore, in allowing for the award of punitive damages, the state is "exercising its historic powers over traditionally local matters as public safety and order," Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board, 315 U.S. 740, 749 (1942), providing a remedy to further "the health and well-being of its citizens," Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25, 430 U.S. 290, 303 (1977).

In sum, then, punitive damages are an integral part of the Anglo-American legal tradition, serving important public policy concerns by providing a specific punitive and deterrent remedy for tortious invasions of person or property, particularly those involving a violation of public

trust.[31] In the federal systems, they have been viewed as a traditional state remedy and an essential ingredient of the State's soverign police powers, protecting individual and societal interests. In dealing with acts of defendants that have "the character of outrage," Prosser, supra, at 9, punitive damages protect "each person's fundamental interest to be free from the risk of injury," "Defense Note," 55 N.Y.U.L.Rev., supra, at 345, and serve "society['s] ... interest in deterring and punishing all intentional or reckless invasions of the rights of others ..." Smith v. Wade,

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[31] The remedy has always been seen as particularly appropriate in matters "offensive and dangerous to the public good." 2 Sutherland, The Law of Damages, §393 at 1275 (3 ed. 1903). This is especially so in cases involving tortious conduct by "public services companies...upon [which] rest such special duties to the public." McCormick, 8 No.Car.L.Rev., supra, at 137; see 1 Sedgwick, supra, §371a at 727-728.

slip op. at 25 (emphasis in original). The States, therefore, have a significant constitutional interest in preserving the full force of "the only civil judicial steel hammer we have." Belli, 49 U.M.K.C.L. Rev., supra, at 23.

II.

NOTHING IN THE LANGUAGE OR LEGISLATIVE HISTORY OF THE ATOMIC ENERGY ACT, OR IN ANY PRECEDENT OF THIS COURT, SUPPORTS THE COURT OF APPEALS' CONCLUSION THAT THE TRADITIONAL AND HISTORIC CONCEPT OF PUNITIVE DAMAGES IS PREEMPTED AS A REMEDY FOR THE TORTIOUS ACTS OF FEDERALLY LICENSED NUCLEAR FACILITIES

Against this backdrop of the traditional, historical place of punitive damages in the law, and their integral role in promoting the State's police power in the federal system, it was incumbent upon the Tenth Circuit to predicate its preemption determination on a solid legal foundation.[32] Yet, the Tenth Circuit concededly could not find any direct or indirect expression

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[32] The court of appeals itself recognized the "strong presumption against preemption of state laws affecting such vital interests of its citizens as those involved in the instant case." Silkwood v. Kerr-McGee, 667 F.2d, supra, at 923. Yet, as amicus explains above, once having identified the importance of the State interest, the Tenth Circuit ignored the pertinent legislative history and the teachings of this Court in the preemption area.

of congressional intent to preempt punitive damages, Silkwood v. Kerr-McGee, 667 F.2d, supra, at 923, nor did the court of appeals state precisely how they could be deemed to conflict with the federal regulatory scheme, id. at 923. Instead, the basis of the court's preemption analysis was its belief, even in the absence of any express directive from this Court, that a federal court must hold "invalid any state action that competes substantially with the AEC (NRC) in its regulation of radiation hazards associated with plants handling nuclear material." Id. In light of the important state interest in punitive damages, and this Court's prior pronouncements in the preemption area, this is a fragile reed upon which to bar entirely a traditional component of a tort action in state court.

Since "Congress legislated here in a field which the States have traditionally occupied... [this Court] start[s] with the assumption that the historic police powers of the States were not

to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Pacific Gas and Electric Co. v. Energy Resources Comm'n, supra, slip op. at 13, quoting from Rice v. Santa Fe Elevator Corp., 331 U.S., supra, at 230. Rather than precluding tort remedies and punitive damages in the nuclear power area, as the Tenth Circuit surmised, Congress has consistently recognized that "traditional [state] tort law principles" apply to all aspects of nuclear activities, see 42 U.S.C. §2210 (Price-Anderson Act); 1966 U.S. Code Cong. and Ad. News 3201, 3211, subject only to the special situation of a major nuclear disaster or "extraordinary nuclear occurrence" (ENO), as determined by the NRC, 42 U.S.C. §2210(n) (1); 10 C.F.R. §140.81-.85. See also, Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978). Even in

these circumstances, state tort laws, subject to certain exceptions, still control.[33] No reason surfaces from the legislative history

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[33] NRC regulations indicate that state tort law applies whether or not the NRC declares an ENO. For example, 10 C.F.R. §140.81(b)(4) provides in relevant part:

> If there has not been an extraordinary nuclear occurrence determination, the claimant must proceed (in the absence of settlement) with a tort action subject to whatever issues must be met, and whatever defenses are available to the defendant, under the law applicable in the relevant jurisdiction. If there has been an extraordinary nuclear occurrence determination, the claimant must still proceed (in the absence of settlement) with a tort action, but the claimant's burden is substantially eased by the elimination of certain issues which may be involved and certain defenses which may be available to the defendant. In either case the defendant may defend with respect to such of the following matters as are in issue in any given claim: The nature of the claimant's alleged damages, the casual relationship between the event and the alleged damages, and the amount of the alleged damages.

or the expression of congressional policy for excluding punitive damages from the broad endorsement of "traditional [state] tort law principles."[34]

Indeed, the entire history of Congressional regulation of nuclear power points unerringly in the direction of an absence of any Congressional intent to preempt punitive damages. When Congress first agreed to open nuclear power development to private enterprises in 1954, it made no mention of state responsibilities or the possible role of private damage actions, 42 U.S.C. §2031; Pacific Gas & Elect. v. Energy Res. Comm'n, supra, slip op. at 14-15.

Three years later, however, Congress adopted the Price-Anderson Act which demonstrated a clear resolve to leave all state tort

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34 Moreover, as will be explained below, the compensatory and punitive remedies available in common law tort actions serve to promote, not undermine, compliance with federal safety standards. See infra, at pp 49-58.

actions in place and undisturbed, except in the event of an ENO, which might lead to claims exceeding the insurance coverage of nuclear licensees. 42 U.S.C. §2210. Additionally, Congress sought to consolidate tort actions and speed the slow pace of litigation for the direct benefit of the victims of an ENO, Duke Power Co. v. Carolina Environmental Study Group, supra. Accordingly, the nuclear industry was required (a) to obtain all the insurance coverage available on the open market, and (b) to waive all defenses traditionally available in state tort action, once the NRC has ruled that an ENO has taken place. 42 U.S.C. §§2210 (m)-(o). Thus, rather than supporting a finding of preemption, the 1957 amendments -- since extended eight times -- strongly suggest that Congress was aware of the availability of state tort remedies, and fully endorsed individual recourse to the courts to vindicate personal and property injury of any kind associated with

nuclear accidents (up to the $560 million limit set in the Act), 42 U.S.C. §2210(k)(1). See also, Comment, "Federal Supremacy in the Regulation of Nuclear Energy: Where Do Punitive Damages Lie?" 13 Seton Hall L. Rev. 42, 58-60 (1982). That no specific mention of punitive damages can be found anywhere does not imply that they were precluded, but rather that Congress did not intend to disturb the existing panoply of common law remedies and actions otherwise applicable to nuclear licensees as well as to other activity similarly subject to federal regulation. Contrary to the view of the Tenth Circuit, amicus' reading of the legislative history supports the conclusion that punitive damages - "historically within the reach of the police power of the States [were] not silently taken away from the States." Askew v. American Waterways Operators, Inc., 411 U.S. 325, 343 (1973).

This conclusion is even more compelling

in the present case, for, as we have explained above, punitive damages have been a vital remedy in legal systems from time immemorial, and have played a central role in the implementation of general state policy in 46 of the 50 states. Smith v. Wade, supra, slip op. at 9. Consequently, a State's traditional and historic concern with redressing reckless or careless tortious conduct causing injuries to its citizens, even that resulting from the operation of nuclear power plants, "touche[s] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [this Court] could not infer that Congress had deprived the States of the power to act." San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244 (1959).[35]

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[35] This principle has been repeatedly reaffirmed in this Court's cases. See, e.g., New York Tel. Co. v. New York State Dept. of Labor, 440 U.S. 519 (1979); Farmer v.

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The majority of the Tenth Circuit, while according lip service to the historic state interest in punitive damages, Silkwood v. Kerr-McGee, 667 F.2d, supra, at 923, ignored the crucial remaining elements of the preemption equation discussed above. Only the vast extension of the doctrine of Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8 Cir. 1977), aff'd mem. 405 U.S. 1035 (1972) far beyond the limits of that specific decision provides any apparent support for the Tenth Circuit's conclusion that punitive damages are preempted by federal law. Yet, as this Court has recently recognized, Northern States dealt with a state regulatory scheme that "fell squarely within the field of safety regulation reserved for

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(Footnote 35 continued)
Carpenters, 430 U.S. 290 (1977) (intentional infliction of mental distress); Linn v. Plant Guard Workers, 383 U.S. 53 (1960) (libel); United Automobile Workers v. Russell, 356 U.S. 364 (1958) (violence); Youngdahl v. Rainfair,
(Footnote continued on next page)

federal regulation." Pacific Gas and Electric Co. v. Energy Resources Commission, supra, slip op. at 19, n. 24. It is quite another thing to extend this Court's summary affirmance in that case, id., to a situation involving remedial, private damage actions that have traditionally and historically been an essential ingredient of any legal system.[36]

(Footnote 35 continued)
Inc., 355 U.S. 131 (1957) (violence); United Construction Workers v. Laburnum Const. Corp., 347 U.S. 656 (1954) (threats of violence).

[36] Federal courts in different settings generally have declined to equate private injury suits with industry-wide regulation, although it has been "rarely discussed," Comment, 13 Seton Hall L. Rev., supra, at 52, n. 102, citing the only Supreme Court decisions which have mentioned the issue: UAW v. Russell, supra; and San Diego Bldg. Trades Council v. Garmon, supra; see, especially United Construction Workers, supra (upholding an award of compensatory and punitive damages for the victim of unfair labor practices, notwithstanding National Labor Relations Board jurisdiction to define and punish the same practice), and Int'l Assoc. of Machinists v. Gonzales, 359 U.S. 617 621-623 (1958) (reconciling a state damage verdict with the partial relief available through the NLRB, citing Laburnum and Russell approvingly.)

In sum, the Tenth Circuit erred in concluding that punitive damages are preempted by the Atomic Energy Act. There is no basis in the legislative history or in this Court's precedents for holding that citizens injured by the reckless or careless conduct of the operators of all other facilities or utilities are entitled to punitive damages, while the victims of nuclear facility tortfeasers are divested of a remedy that is an integral part of virtually every recorded legal system. The power to fashion policy in an area that historically and traditionally has been reserved to the State "is not to be denied on the basis of speculation about the unexpressed intent of Congress." New York Tel. Co. v. New York State Dept. of Labor, 440 U.S., supra, at 545.

III

THE TENTH CIRCUIT FAILED TO RECOGNIZE THAT PUNITIVE DAMAGES AND RELATED STATE TORT REMEDIES PROMOTE AND FACILITATE, RATHER THAN COMPETE WITH, COMPLIANCE WITH THE NRC'S RADIATION PROTECTION STANDARDS

In other contexts, this Court has sustained state common law remedies where they are not likely to conflict with federal regulations, (~~infra at p. 44, n. 34~~) (supra at p. 47, n. 36). Thus, in the area of labor management relations, despite the overriding federal presense, a unanimous Court has approved of state jurisdiction to compensate victims for harms not compensable under the federal act: "[A]s with the defamation actions preserved by [Linn v. Plant Guard Workers, 383 U.S. 53 (1966)], state court actions to redress injuries caused by violence or threats of violence are consistent with effective administration of the federal scheme." Farmer v. United Brotherhood of Carpenters and Joiners, Local 25,

430 U.S. 297, 299-300 (1977). See also Nader v. Allegheny Air Lines, Inc., 426 U.S 290, 299 (1976): "There is clearly no irreconcilable conflict between the statutory federal scheme and the persistence of common law remedies."

Silkwood's claim for punitive damages is of a similar character. Indeed, as will be shown, not only is it "consistent with effective administration of [NRC regulation]," Farmer, 430 U.S., supra, at 299-300, but case-by-case adjudications will affirmatively advance the goals and standards contained in the NRC code. This is so in large part because the NRC's radiation exposure regulations, 10 C.F.R. Part 20, vest extraordinary discretion in the companies they regulate. This discretion is then coupled with a generalized duty to seek ways to lower radiation exposures below existing numerical guides, due to the universally accepted premise that there is no such thing as a totally safe dose of ionizing radiation, no matter how small.

Crowther v. Seaborg, 312 F.Supp. 1205, 1231 (D. Colo. 1971). Thus, the standards provide that licensees

> should, in addition to complying with the requirements set forth in this part, make every reasonable effort to maintain radiation exposures and releases ... [to levels] as low as is reasonably achievable (emphasis added) 10 C.F.R. §20.1(c)

To advance toward the "as low as is reasonably achievable" ("ALARA") goal, licensees are asked to engage in a process which is as subjective as it is complex:

> The term [ALARA] means as low as is reasonably achievable taking into account the state of technology, and the economics of improvements in relation to benefits to the public health and safety, and other societal and socioeconomic considerations, and in relation to the utilization of atomic energy in the public interest. Id.

No further definition of these critical terms is to be found; nor is the licensee required periodically to show its efforts on behalf of the ALARA goal as a condition to its license.

In such a context, the processes and remedies of traditional state tort laws may be indispensable if the ALARA standard is to be accorded the attention it demands. Therefore, access to common law remedies -- including one of its most effective tools, punitive damages -- far from undermining NRC regulations, actually supports and promotes compliance in a most practical, case-by-case manner.

In addition to ALARA, the NRC relies extensively on self-reporting and self-policing. See generally, 10 C.F.R. §21.21(a) (instructs licensees to "adopt appropriate procedures" to identify and report "deviations" or "defects") and §22.61 (imposes civil penalties on companies which "knowingly and consciously" fail to notify the NRC of their noncompliance). Furthermore, licensees are instructed to report the "theft or loss" of nuclear materials (such as the plutonium which contaminated Karen Silkwood) but only if "it appears to the licensee that a substantial

hazard may result." 10 C.F.R. §20.402(a) (emphasis added) ("Substantial hazard" is not defined in the regulation). Moreover, immediate notification is not mandated unless the licensee determines, e.g., that the plutonium "may have caused or threatens to cause" ... [d]amage to property in excess of $200,000," Id., at §20.403 (a)(4). Notification can be withheld for up to a day if the licensee believes that damage will lie between $2,000 and $200,000. Id., at §20.403(b) (4). Yet, obviously, NRC licensees may not be experts in the fine art of assessing the value of homes, furnishings, and personal effects that could be contaminated. This, of course, is a traditional jury role in specific cases. (The only portion of the Silkwood award sustained by the majority was on this very point: Liability of $5,000 for contaminated personal property which had to be destroyed. Silkwood v. Kerr-McGee, 667 F.2d, supra, at 920-921.)

Even the NRC's precise-sounding numerical radiation standards rest upon a shifting foundation of approximations and self-evaluation by the licensees. For example, the basic unit of occupational exposure, the rem, can be calculated only after braving a bewildering maze of inexact assumption-filled measurements. Indeed, the regulation permits alternative yardsticks to measure "rems" which show the folly of asserting objectivity or exactitude in the standards:

> If it is more convenient [to the licensee] to measure the neutron flux, or equivalent, than to determine the neutron dose in rads, ... one rem of neutron radiation may ... be assumed to be equivalent to 14 million neutrons per square centimeter incident upon the body; or if there exists sufficient information to estimate with reasonable accuracy the approximate distribution in energy of the neutrons, the incident number of neutrons per square centimeter equivalent to one rem may be estimated from the following table [which sets forth, inter alia, the "[a]verage flux to deliver 100 millirems in 40 hours"] 10 C.F.R. §20.403(b)(4).

Such expressions of convenience, approximation and average are found throughout the regulations. See, e.g., 10 C.F.R. §20.3(a)(4) (defines "calendar quarter", the basic duration of dose measurement, as 12 to 14 weeks), §20.102 (c)(1) (in estimating dose levels, "the licensee shall make a reasonable effort to obtain reports of the individual's previously accumulated occupational dose") (emphasis added), and §20.105(a) (describes estimates of "anticipated average radiation levels" and provides for NRC approval if "not likely" to exceed 0.5 rem in "one calendar year"). Taken together, they unmask any claim of surgical precision to NRC radiation standards. Plainly, in such a fluid state of regulation much depends upon the good faith and diligence of the federal licensee -- attributes which susceptibility to state civil

suits can only encourage.[37]

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[37] Similar policies underly the pattern of federal courts upholding substantial jury awards for compensatory and punitive damages against companies heavily regulated by federal agencies; See cases collected and discussed below, Silkwood v. Kerr-McGee, 486 F.Supp. at 577-587: "Had this Court instructed the jury that substantial compliance with governmental regulation would bar an award of actual damages in the area of nuclear power, the Court would have paved a new road in jurisprudence that heretofore has not existed in any comparable area of the law." Id., at 577 (emphasis added). For example, there is federal preemption of state safety regulation of commercial aircraft design, but state tort liability still attaches, In re Paris Air Crash of March 3, 1974, 399 F.Supp. 732 (C.D. Cal. 1975), Rigby v. Beech Aircraft Co., 548 F.2d 288 (10 Cir. 1977), and other cases cited at Silkwood, 488 F.Supp. at 578: "The same principles obtain in the field of drug manufacture and distribution..." (citations omitted). Id.

The sole cases to the contrary are two New Jersey cases, State Dept. of Environmental Protection v. Jersey Central Power & Light Co., 69 N.J. 102, 351 A.2d 337 (1976), and Van Dissel v. Jersey Central Power & Light Co., 152 N.J. Super. 391, 377 A.2d 1244 (Law Div. 1977), aff'd 181 N.J.Super. 516, 438 A.2d 563 (App. Div. 1981), certif. den. 89 N.J. 409, 446 A.2d 142 (1982), cert. pet. filed No. 81-2065, 50 U.S.L.W. 3918 (1982). Both cases are readily distinguishable from Silkwood: In State DEP v. JCP&L, the New Jersey Supreme Court ruled that the state had failed to prove causation in

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As for punitive damages, which focus more

(Footnote 37 continued)
fact in a suit against a nuclear operator to collect damages for the destruction of fish; the court's further ruling that the claim was preempted is dictum. Id., at 106, 109-110 ("Cause in fact was an essential element in the State's case [which it failed to prove]." Id.) Moreover, unlike the escape of plutonium in Silkwood, which had no legitimate purpose, federal regulations "require[d] that the facility"...be shut down." Id., at 114 (emphasis in original). Therefore, even if the closing of the power plant had caused the fishkill, federal rules had compelled it to do so. Id. It is well-settled, of course, that when compliance with state standards would directly conflict with federal requirements, the former must yield. Florida Avocado Growers v. Paul, 373 U.S. 132 (1963); Pacific Gas & Elec. v. State Energy Res. Comm'n, supra, slip op. at 11 ("[S]tate law is preempted to the extent it actually conflicts with federal law" (emphasis added). In Van Dissel, a lower New Jersey court distinguished State DEP v. JCP&L, supra, in an action to recover damages from "shipworms" proliferating in a coastal waterway due to increased water temperature and salinity levels caused by the operation of a reactor, Van Dissel v. JCP&L, 152 N.J. Super. supra, at 396-398, 377 A.2d at 1246-1246. The court felt bound to follow State DEP v. JCP&L, supra, 152 N.J.Super., supra, at 401, 377 A.2d at 1249, but held for the claimants anyway on a theory of inverse condemnation, Van Dissel v. JCP&L, 152 N.J.Super., supra, at 403-410, 412, 377 A.2d at 1250-1255. A petition for cert. is pending before this Court. No. 81-2065, 50 U.S.L.W. 3918 (1982).

on the tortfeasor's state of mind than the injury actually suffered, Smith v. Wade, slip op. at 9-12, n. 8, 17-18, they serve an added and independent purpose. They remind licensees that a careless or reckless attitude will not be tolerated from those entrusted with such awesome public responsibilities. Id. at 15-18. For, absent the threat of stiff damage awards, these largely self-supervising companies would have little incentive to be ever watchful and fair as they, inter alia, consider ALARA and weigh whether even to report themselves in close cases.

CONCLUSION

Amicus' review of the history of punitive damages reveals that the Tenth Circuit seriously undervalued the critical significance of the State interest in affording a private remedy for reprehensible or reckless conduct that causes tortious injury to person or property. Once having failed to recognize the historic and traditional role of punitive damages, the court of appeals erroneously assumed that this essential attribute of the state's police power could be "silently taken away from the States." Askew v. American Waterways Operators, Inc., 411 U.S. 325, 343 (1973). This conclusion is not only at odds with the Court's preemption analysis but also severely undermines essential functions and responsibilities of the states in the federal system.

Indeed, punitive damages facilitate, rather than impede, the cooperative federal-state relationship contemplated by Congress and the

NRC in the nuclear energy area. Pacific Gas and Electric v. Energy Resources Comm'n, supra, slip op. at 12-19.

For the reasons stated above, amicus respectfully submits that the portion of the Tenth Circuit's judgment which concluded that the trial jury's award of punitive damages is preempted by the Atomic Energy Act should be reversed, and the case remanded for reinstatement of this damage award.

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